RMIT University

Response to the Review of the Foreign Arrangements Scheme

August 2024

RMIT University welcomes the opportunity to respond to the Australian Department of Foreign Affairs and Trade *Review of the Foreign Arrangements Scheme Consultation Paper 2024*. We acknowledge that the consultation paper is designed to facilitate public submissions to the legislative review of the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* and that this review is mandated by Section 63A of that Act.

RMIT is Australia's largest dual sector provider of higher education and vocational training and a leader in industry focused research. We have a strong, long-standing tradition of international engagement and collaboration, with more than 90,000 students and over 11,000 staff at multiple sites in Victoria, Vietnam and Spain. We also offer programs through partners in Singapore, Hong Kong, Sri Lanka, Indonesia, India and China as well as research partnerships across the globe. Our diverse global community of more than 500,000 graduates live, work and contribute in more than 150 countries.

As an organisation operating and partnering globally for decades, RMIT supports the aims of *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* ('the **Act**') and the related Foreign Arrangements Scheme ('the **Scheme**') managed by the Department of Foreign Affairs and Trade (**DFAT**). Both have highlighted the need to protect and manage Australia's foreign relations, while requirements and processes around notifications set up under the Scheme have promoted transparency and supported a more consistent approach to foreign policy across all levels of government, including public entities like universities. There is opportunity, however, to refine the Act to enable a more targeted, risk-informed Scheme that will:

- Significantly reduce the compliance burden on State and Territory entities, including universities.
- Ensure that DFAT is not overburdened with early-stage or otherwise low-risk foreign arrangement notifications.
- Minimise unintended consequences, such as a chilling effect on the development or deepening of international partnerships and collaborations.

More detail and suggestions for changes to the Act and Scheme are provided below in response to the questions posed in the *Consultation Paper*.

1. **Has the Foreign Relations Act been effective in delivering against its objectives, to ensure consistent adherence to Australia's foreign policy through foreign engagement?**

The purpose of the Foreign Relations *(State and Territory Arrangements)* Act is to protect and manage Australia's foreign relations by ensuring that foreign arrangements are consistent with Australia's foreign policy. As noted above, RMIT believes the Act has been effective in promoting transparency and supporting a consistent approach to foreign policy across all levels of government. There is opportunity, however, to refine the Act to support a more risk-informed Foreign Arrangements Scheme that reduces the cumbersome administrative burdens and processes currently in place which detract from the Act's objectives.

2. **How could the operation of the Foreign Relations Act be improved? Are there amendments to the Foreign Relations Act that would enhance its operation?**

RMIT understands that DFAT has received over 17,000 foreign arrangement notifications since the Act took effect on 10 December 2020. It is also understood that approximately 12,000 of those 17,000 notifications fell within the scope of the Act, and as of 1 August 2024, 9,894 foreign arrangements have been published on the Public Register. These numbers suggest an overreporting of foreign arrangements, causing undue administrative burden on State/Territory entities as well as on DFAT to administer the Scheme.

RMIT argues that overreporting is due in large part to the overly broad nature of the Act's scope and definitions which has led to uncertainty in its application. The numbers are also an indication that State and Territory entities take their foreign arrangements obligations seriously; they are a sign, in our view, that self-regulation within a principles-based framework that allows the regulator to monitor compliance may be more efficient and reduce unintended consequences.

While self-regulation may not be appropriate in all circumstances, RMIT believes that foreign arrangements involving universities could more effectively and efficiently be managed under a less-prescriptive risk-based framework along the lines of the *Guidelines to Counter Foreign Interference in the Australian University Sector*. This recognises that the introduction of the Scheme provided an opportunity for universities to review comprehensively their existing foreign arrangements, generated an uplift in institutional due diligence processes (i.e. 'know your partner' due diligence) and enhanced the knowledge and awareness of the intersections between (and possible risks to) Australia's foreign policy settings and university arrangements with international partners.

RMIT notes, furthermore, that reputational considerations are clearly the principal driver of university compliance given that neither the Act nor the Scheme set out fines or other penalties for non-compliance. In support of these arguments RMIT notes that:

- Approximately 70-80% of notifications to date are from universities, a significant proportion of which have been deemed 'Out of Scope' by DFAT.
    - by 23 July this year, for example, RMIT had submitted 605 foreign arrangement notifications, with 310 of them (approximately 51%) determined to be 'Out of Scope' by the department.
- Only four (4) foreign arrangements have been cancelled by the Minister since the Act commenced, none involved a university partner, and none have been cancelled since April 2021[1].

[1] The four arrangements cancelled to date are: a Memorandum of Understanding between the Department of Education and Training (Victoria) and the Technical and Vocational Training Organisation, Ministry of Labour and Social Affairs, the Islamic Republic of Iran, signed 25 November 2004; a Protocol of Scientific Cooperation between the Ministry of Higher Education in the Syrian Arab Republic and the Ministry of Tertiary Education and Training of Victoria, signed 31 March 1999; a Memorandum of Understanding

Improving the Act involves addressing several key areas to enhance the efficiency of the Foreign Arrangements Scheme, reduce administrative burdens on State/Territory entities, and better support international cooperation while maintaining alignment with Australia's foreign policy objectives.

RMIT notes that the Act's broad scope and unclear definitions have caused overreporting resulting in a disproportionate administrative burden relative to risk for both State and Territory entities and DFAT. **RMIT therefore recommends narrowing the scope of the Act, and therefore the Scheme, by adopting a principles-based approach, refining the stage at which notifications are required, and clarifying certain definitions**. This could involve identifying and focusing on activities, arrangements, and countries deemed to be at higher risk of adversely affecting Australia's foreign policy aims. RMIT recommends that the Government considers:

- Reframing the Act to support a principles-based framework that includes supporting Schedules/Rules that can be updated as needed within the increasingly dynamic foreign relations and policy contexts that Australia must navigate.
- Adopting the approach taken by the recent Safeguarding Australia's Military Secrets (SAMS) legislation and the *Defence Trade Controls Amendment Act 2024*.
    - Under the former, the *Defence (Non-relevant foreign county) Determination 2024* is an instrument that officially deems Canada, New Zealand, the United Kingdom and the United States as 'not relevant' foreign countries for the purposes of the definition of relevant foreign country in section 113 of the *Defence Act 1903*.
    - In conjunction with the latter, a licence-free environment is being operationalised by Australia, the United Kingdom and the United States to provide national exemptions for each other from their respective export control licencing requirements.
    - There is also the possibility of utilising a narrowly targeted ban on arrangements with designated high-risk countries akin to the Australian Autonomous Sanctions regime.

  RMIT understands that a significant number of notifications to DFAT relate to foreign arrangements with entities from Japan, New Zealand, the UK and the US. Removing some or all of these countries from the scope of the Foreign Arrangements Scheme would reduce the number of notifications requiring DFAT review and improve efficiencies while maintaining the objectives of the Act.
- Removing certain non-consequential agreements from the scope of the Act. For example, MoUs, Sister State Agreements and PhD cotutelle programs are unlikely to present a high-risk to Australia's foreign relations or foreign policy aims. In fact, approximately 87% (110 out of 126) of RMIT's PhD cotutelle agreements notified to DFAT were determined to be 'Out of Scope'. Shifting the focus of the Act to cover legally binding arrangements only would go a long way towards streamlining the Scheme without posing any greater risk.
- Revising the notification system to either eliminate the two-step requirement or increase the 14-day time limit for notifying DFAT of signed foreign arrangements to 30 or even 60 days.
    - Increasing the time limit for notifying signed foreign arrangements would reduce the administrative burden for universities and provide more time for internal review of arrangements.

between the Government of Victoria and the National Development and Reform Commission of the People's Republic of China on Cooperation within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative, signed 8 October 2018; a Framework Agreement between the Government of Victoria and the National Development and Reform Commission of the People's Republic of China on Jointly Promoting the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road, signed on 23 October 2019.

- The term 'institutional autonomy', as defined in section 8 of the Act, is difficult to apply and results in overreporting due to uncertainty in application. Investigating whether a foreign university has institutional autonomy is burdensome, and universities lack the necessary capacity/resources to accurately determine the extent to which 'autonomy' exists. Universities must rely on public sources of information to determine institutional autonomy, which can be unreliable, time consuming to locate and assess, and/or require specialist foreign language capabilities.
- Clarifying the term 'corporation that operates on a commercial basis' would also help avoid ambiguity and ensure that only arrangements with relevant foreign entities are subject to the Act. It is difficult for universities to determine whether a corporation is sufficiently 'pure' in its commercial dealings. For example, there is a grey area in which a state-owned corporation that operates on a commercial basis also serves a public purpose. There is an opportunity for DFAT to provide illustrative scenarios using fictitious countries and/or entities to clarify this and other terminology used in the Act or the operation of the Scheme.
    - For example, it is unclear to RMIT what resources or methods DFAT used to determine that approximately 51% of our notifications were 'Out of Scope'.

3. Are there opportunities for the Foreign Relations Act to better support international cooperation in the national interest?

Revising the operation of the Act to make it more efficient would better support universities in their efforts to engage in beneficial international partnerships that support Australia's foreign policy and Australia's growth and development.

The requirement to notify DFAT of early-stage and/or low risk arrangements has the potential to 'chill' or inhibit international collaboration and partnerships. Early notifications of potential arrangements can offend partners, which results in current and future relationships being shut down. This risk dissuades universities, and the academics who generally lead the bulk of early- stage engagement with potential collaborators, from engaging in beneficial conversations with international partners that may be crucial to advancing Australia's interests. This is particularly the case for research and innovation activities, industry engagement and large-scale transnational education initiatives.

The risk of investing time and reputational capital is simply too great when a foreign collaborator thinks that an arrangement might be cancelled at any stage. Government/DFAT providing greater visibility over which types of arrangements, foreign entities, and/or countries it views as posing a higher risk would assist universities in building institutional confidence to engage in and grow international relationships that support Australia's foreign policy aims.

There are two points here: 1) notification of the arrangement and 2) disclosure of the agreement clauses to the Australian government. Some foreign entities may be reluctant to have contract details shared with government due to confidentiality and/or competitiveness concerns. This reduces the confidence international partners may have in the security of their collaborations with Australia's universities, including in areas of strategic interest for foreign policy.

RMIT notes that universities are distinct from many other State and Territory entities under the Act in that some of our activities are profit-driven as a means of supplementing funding received from the public purse. From this perspective, full disclosure of contract clauses should be considered differently from contracts involving State and Territory government departments and be viewed through the lens of commerciality and competitiveness as well as the need to protect intellectual property.

RMIT also notes that building effective international partnerships takes significant time and resources, and the goal is often to build long-term relationships involving many types of activities. These types of relationships cannot be established quickly, often taking years to establish and mature. In this operating environment, the requirement to notify DFAT of prospective arrangements as well as binding agreements with contractually enforceable outcomes reduces the commercial and legal leverage universities have in the negotiation of arrangements, as well as affecting the number of partners willing to deal with Australian universities.

4. **Could the Foreign Relations Act be better calibrated to address foreign policy risks and changing foreign policy settings?**

It is worth repeating here that there is an opportunity to introduce certain thresholds or exceptions to reduce the scope of agreements that need to be reported to DFAT. For example, introducing exceptions for arrangements with specified countries whose foreign policy settings align with Australia's would streamline the process, focus attention and resource on higher-risk arrangements and reduce unnecessary administrative burdens for both State and Territory entities and DFAT.

Moving to a principles-based framework with schedules that can be regularly updated by instruments, in ways similar to the Autonomous Sanctions regime and the new SAMS legislation, would allow the operation of the Act to adapt to changing foreign policy settings. Having schedules that can be varied with minimal legislative changes would create guidelines that can be adjusted to match the evolving global context.

5. **Should the scope of the Foreign Relations Act be changed to apply to a broader or narrower range of international cooperation?**

As noted above, narrowing the scope of the Act by implementing a principles-based approach that directs efforts towards higher risk arrangements will more efficiently focus reporting and DFAT review. Revising the stage at which notification is required would also make the Act more targeted and effective while reducing unintended consequences. Early-stage agreements, which are often ceremonial and simply set up to establish a framework for considering the development of binding agreements in the future (eg MoUs), should be exempt from the Foreign Arrangements Scheme.

6. **Does the Foreign Relations Act strike the right balance between achieving its objectives and the administrative requirements it places on states, territories, local governments, and universities?**

Universities are already subject to numerous regulations and compliance frameworks involving reporting. This is leading to regulatory fatigue and a drain on resourcing that could be better directed to activities that support Australia's foreign and domestic policy aims. The Act's administrative burden falls particularly heavily on smaller or less well-resourced institutions, placing unnecessary barriers to the expansion of meaningful international engagement.

Many of these regulations and compliance frameworks require 'know your partner' due diligence practices or formal permit processes that result in unnecessary duplication under the Foreign Arrangements Scheme notification requirements and the Act more broadly. Examples include institutional review and reporting requirements under the *Guidelines to Counter Foreign Interference in the Australian University Sector*, Australian Autonomous Sanctions processes, and assessments under the Defence Export Control Legislation. These processes are rigorous and more than sufficient in addressing the majority of the risks to foreign policy in university arrangements with foreign entities.

Despite the legislative requirement for State and Territory entities to have systems in place to respond to Ministerial declarations voiding an arrangement, only four arrangements out of more than 17,000 (0.00046%) nationwide have resulted in cancellation. To date, RMIT has not received any decisions or declarations from the Minister regarding any notified foreign arrangements yet must maintain full compliance systems. From our perspective, the purported benefits of the Scheme do not justify the administrative burden of compliance and divert DFAT's attention from activities that would more positively support Australia's foreign policy aims.

7. **Are there additional ways that the Foreign Relations Act can improve transparency and awareness of international engagement, including through the Public Register?**

The Public Register aims to promote transparency and awareness of international arrangements involving State and Territory entities. The extent to which it achieves this aim is questionable.

In our view, while an argument can be made that the Public Register supports communication and information sharing between government departments, there is little value and elements of risk in making the information publicly available. While exemptions can be sought in limited circumstances, RMIT has concerns, for example, that publication of arrangement details in a public forum could expose institutions to more targeted cyber-attacks, because the Public Register provides information that potential threat actors could use to target entities for attack or espionage. Universities hold significant amounts of valuable and sensitive information. A threat actor knowing that university x has an arrangement with the US defence force may increase the risk of cyber and other forms of attack.

For State and Territory entities including universities, the Public Register is of limited benefit. There is very little indication of why some arrangements are on the Public Register and others aren't, which party triggered the notification, and what kinds of risk factors or substantive matters were assessed by DFAT before the arrangement was added. This means the Public Register does not allow entities to understand various factors in the decision-making process that could then be used to inform internal reviews.

Entities also do not receive any notification from DFAT when one of its foreign arrangements has been added to the Public Register. This adds a layer of complexity for entities which is exacerbated by the fact that the Register is very difficult to search. One cannot, for example, search by institution name.

8. **Are there opportunities to better support compliance with the Foreign Arrangements Scheme, including through publicly available information and outreach initiatives?**

RMIT has found our contacts at the Foreign Arrangements Branch of DFAT to be very responsive to our communications with them, including queries about 'Out of Scope' arrangements and administrative matters. This has mitigated to some extent the administrative burden of the Scheme for the university but has, in effect, simply passed additional burden and resourcing costs on to DFAT.

The DFAT Portal has bugs that significantly impact the time and effort it takes to notify the department of foreign arrangements. Notified arrangements also only show in the system as 'Notification Received', making it unclear where the notification is within the assessment process.

DFAT have provided good resources and guidance materials on the Act and the Scheme. More consistent and proactive feedback on why certain notifications are 'Out of Scope' is needed, however, as this would support institutions to more accurately assess the need to submit an arrangement to the Portal for review, thereby reducing the number of 'Out of Scope' arrangements notified/reported.